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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

O. SCOTT DREXLER,
ERIC PARKER, and
STEVEN A. STEWART,

Defendants.

2:16-CR-00046-GMN-PAL

**GOVERNMENT'S RESPONSE IN
OPPOSITION TO DEFENDANT
STEWART, PARKER, AND
DREXLER'S OMNIBUS MOTION IN
LIMINE (ECF No. 1332, 1340 and
1414)**

CERTIFICATION: This Response is timely filed.

The United States, by and through the undersigned, respectfully submits its Response in Opposition to Defendant Stewart, Parker, and Drexler's Omnibus Motion in Limine (ECF No. 1332) which was joined by defendants Ricky Lovelien (ECF No. 1340) and Mel Bundy (ECF No. 1414). As discussed below, the

1 defendants' motion raises various issues, all of which are either meritless or moot.
2 Accordingly, the motion should be denied.

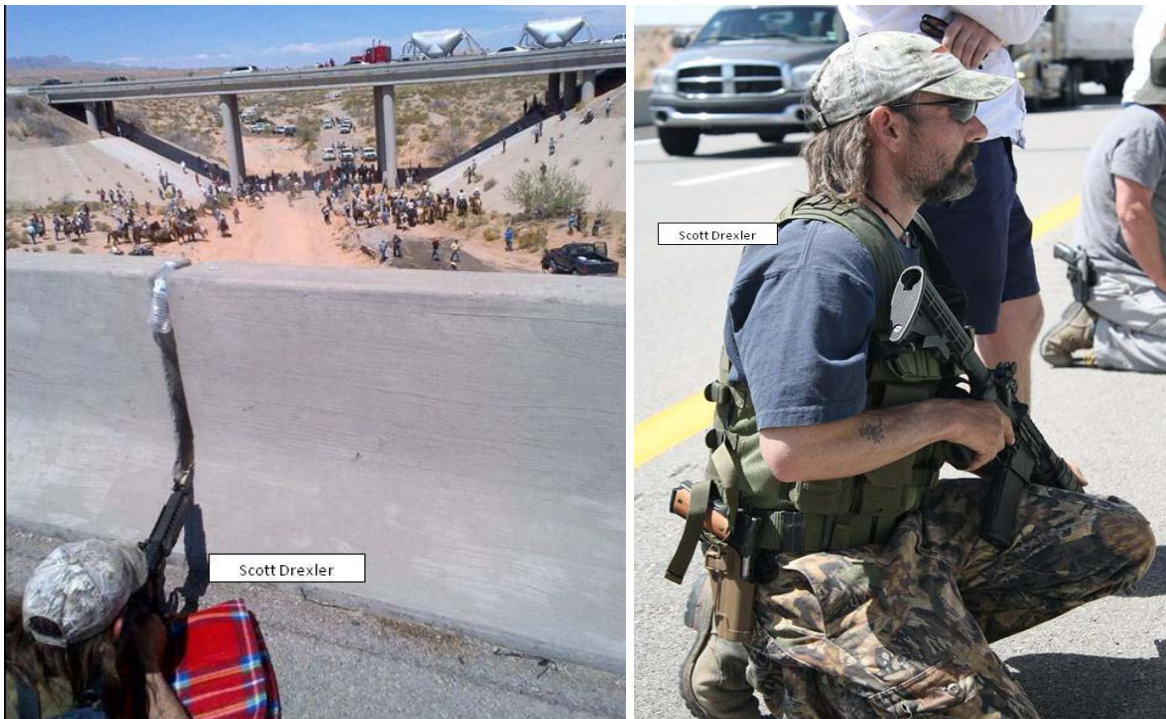
3 **BACKGROUND**

4 This is a conspiracy case arising from a massive assault against federal
5 officers that occurred near co-defendant Cliven Bundy's ranch in Bunkerville,
6 Nevada, on April 12, 2014. On March 2, 2016, a federal Grand Jury seated in the
7 District of Nevada returned a Superseding Criminal Indictment ("SSI"), charging
8 defendants Steven Stewart, Scott Drexler and Eric Parker, as well as 16 other
9 defendants with, among other things, conspiring to assault federal officers, obstruct
10 justice, extort federal officers, and use and brandish a firearm in relation to a crime
11 of violence, and the substantive offenses that comprise the objects of the conspiracy,
12 all in violation of Title 18, United States Code, Sections 371; 372; 111(a)(1) and (b);
13 1503; 1951; and 924(c).

14 On April 12, 2014, defendants Parker, Drexler and Stewart took up tactically
15 superior positions over federal officers defending their operation base against a
16 swarm of people sent there by Cliven Bundy to get his cattle, advancing toward the
17 officers and refusing to comply with their orders to leave the area. Defendants
18 Parker, Drexler and Stewart were each armed with an assault rifle and were
19 observed and documented taking positions of cover and concealment behind the
20 jersey barriers on the I-15 bridge or either pointing or carrying their firearm in a
21 ready position facing toward the officers:
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[Steven Stewart and Scott Drexler on northbound I-15 bridge]



[Scott Drexler on northbound I-15 bridge]



[Eric Parker on northbound I-15 bridge]

On March 3, 2016, Parker, Drexler and Stewart were arrested pursuant to arrest warrants issuing from the Superseding Indictment. Shortly after their arrests, both Parker and Stewarts' firearms and ammunition were turned over to the FBI and booked into evidence.

1 Defendants are currently set to proceed to trial on February 6, 2017. On
2 January 18, 2017, defendants filed the instant motion seeking to preclude the use
3 of various terms, reference to firearms seized post-arrest, and reference to the
4 defendants' "militia" affiliations.

5 LEGAL STANDARD

6 "Judges have broad discretion when ruling on motions in limine." *McConnell*
7 *v. Wal-Mart Stores, Inc.*, 995 F. Supp. 2d 1164, 1167 (D. Nev. 2014). "However, a
8 motion in limine should not be used to resolve factual disputes or weigh evidence."
9 *Id.* To obtain the exclusion of evidence under such a motion, a party must prove
10 that the evidence is clearly inadmissible on all potential grounds. *Id.* (citations and
11 internal quotation marks omitted). "Unless evidence meets this high standard,
12 evidentiary rulings should be deferred until trial so that questions of foundation,
13 relevancy and potential prejudice may be resolved in proper context." *Id.* at 1168,
14 quoting *Hawthorne Partners v. AT & T Tech., Inc.*, 831 F.Supp. 1398, 1400 (N.D. Ill.
15 1993).

16 ARGUMENT

17 Defendants raise a variety of issues in their omnibus motion. However, they
18 fail to meet the "high standard" required to exclude evidence, relying almost
19 exclusively on an unreliable expert witness to bolster their argument or else
20 providing little to no authority at all for their positions.

21 First, defendants seek to preclude the government from using the terms
22 "gunmen," "snipers" and "assault rifles" because, they argue, such use would be
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1 more prejudicial than probative under Federal Rule of Evidence 403 and improperly
2 suggest that the defendants have “an inadmissible history” of prior bad acts under
3 Federal Rule of Evidence 404(b). Mot. at pp. 3-8. However, the Court has already
4 addressed the relevance of these terms in its January 6, 2017, Order regarding
5 Defendant Payne’s Motion to Strike Surplusage (ECF No. 1249). The Court
6 recognized the government’s position that such terms are “plainly relevant and
7 material” and that the government “intends to prove the propriety of using these
8 terms” at trial. *Id.* at p. 4. In sum, the Court correctly stated that these terms
9 “collectively form the core of the government’s theory of prosecution – that a violent,
10 multi-defendant conspiracy caused a violent armed assault and extortion.” *Id.*
11 After carefully considering the parties’ arguments, the Court reviewed the
12 Superseding Indictment and only struck from it the term “lie,” the phrase “and Used
13 Deceit and Deception to Recruit Followers,” and the phrase “and ill-gotten gain.”
14 *Id.* at pp. 6-7. By striking these phrases while leaving the terms “gunman,” “sniper”
15 and “assault rifle” in place, the Court implicitly recognized that these terms are
16 “necessary to establishing context for crimes . . . or any element of the offenses
17 charged.” *Id.* at p. 6. Given the Court’s ruling, defendants’ argument, based on
18 nothing more than a proffered “expert witness’s” statement that the defendants
19 were not gunmen or trained snipers, must be rejected.

21 Additionally, as defendants themselves state, the term gunman is commonly
22 defined as “a man armed with a gun...” Mot. at p. 4, citing *Merriam-Webster’s*
23 *Dictionary*, www.merriam-webster.com/dictionary/gunman. Just as the Court
24

1 Order states, the government intends to submit evidence that the defendants were
2 armed with guns and as such were “gunmen.”¹ Similarly, the government intends
3 to introduce evidence that the officers in the wash, based on their training and
4 experience, perceived and described the defendants and others with weapons on the
5 bridges to be acting like “snipers” or “sniper and spotter teams” and that the threat
6 the officers felt on April 12 was in large part due to these sniper positions and
7 sniper-like conduct by the gunmen defendants. Accordingly, the motion should be
8 denied. *See Ragsdale v. Sidoti*, 5:12 CV 2484, 2015 WL 10986351, at *2 (N.D. Ohio
9 2015) (declining to exclude reference to defendant as “sniper,” noting it would rule
10 on the admissibility of evidence in the context of trial).

11 Defendants offer nothing to support their conclusory allegations that use of
12 the terms “gunman,” “sniper,” and “assault rifle” would “improperly suggest” that
13 the defendants have “an inadmissible history of bad acts.” Mot. at pp. 8-9. As
14 discussed above, the government intends to submit evidence that the defendants
15 acted as gunmen and took up sniper positions using assault rifles on April 12, 2014.
16 The government does not intend to offer any evidence that the defendant acted as
17 gunmen, snipers or utilized assault rifles prior their involvement in the charged
18 conspiracies. Accordingly, the defendants’ argument on this point lacks merit and
19 should be rejected.
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22 ¹ Courts have universally referred to defendants in violent crimes cases involving firearms
23 as “gunman.” *See e.g. United States v. Hartz*, 458 F.3d 1011, 1014 (9th Cir. 2006). A
24 Westlaw query shows the term gunman being used in 153 Ninth Circuit opinions and in 630
opinions from district courts in the Ninth Circuit. The government was unable to identify a
single case where a court excluded the term “gunman.”

1 Moreover, what defendants really seek to do is exclude characterization of
2 the case. To the extent reference to gunmen, snipers and assault rifles are
3 inadmissible then characterizations regularly used by the defendants, including in
4 the instant motion, such as protest, peaceful protest and protestors in referring to
5 Bundy followers would be equally barred under such logic.

6 Defendants also seek to preclude use of the terms “III%ers,” “militia,” and
7 “domestic terrorism” as more prejudicial than probative under FRE 403 because
8 these groups have been described as “domestic terrorists” by former-Senator Harry
9 Reid and others. Mot. at pp. 14-15. This is frivolous. Once again, the Court has
10 ruled on this. ECF No. 1249. The term militia was significant to the defendants in
11 the conspiracy case. The evidence the government will adduce at trial indicates
12 that the Bundy family, Ryan Payne, Pete Santili and others put out calls for help
13 and calls to arms to people and groups they described as “militia,” including the
14 III%ers group. Additionally, the government proffers that evidence will show that
15 different campsites were provided near the Bundy Ranch, with some being
16 described as “militia” camps. Finally, the evidence will show that the defendants
17 and others describe the gunmen who supported the Bundys on April 12 as the
18 “militia.” Thus, the term militia is direct evidence of the criminal charges in this
19 case. Additionally, although the government does not intend to prove the
20 defendants were “domestic terrorists” nor will it seek to admit evidence that they
21 were “domestic terrorists” or engaged in acts of “domestic terrorism” these terms
22 may come in either through agents discussing their backgrounds or through the
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1 defendants' self-description in various social media posts or other contexts, or
2 through evidence wherein conspirators used this term to call others to arms. Absent
3 the defendants' identification of specific documents, it is impossible for the Court to
4 make a ruling at this stage. Accordingly, the Court should deny the motion with
5 respect to these terms.

6 Defendants also seek to preclude admission of evidence regarding firearms,
7 ammunition, and gear seized post-arrest that was not present on April 12, 2014.
8 They provide a list of items they seek to exclude based on their expert witness's
9 assertion that such items do not appear in any photographs. The Court should
10 decline to exclude such items based solely on the defense expert's review of
11 photographs at this early stage and instead determine whether evidence that
12 emerges at trial provides a basis to conclude that any particular item was in a
13 defendant's possession during the assault on April 12, 2014. *See Ragsdale*, 5:12 CV
14 2484, 2015 WL 10986351, at *2

15
16 Much of Stewart's motion relies on Mr. Alphrin's overbroad twelve-page
17 report, which contains a host of inadmissible opinions regarding this case. The
18 following are but a few examples:

- 19 • "I did not see assault rifles in the possession of the peacefully
20 assembled civilians...."
- 21 • "Had the agents 'opened fire' on the women and children, as they
22 promised to do, they would have had a combined capability of firing
23 33,900 rounds of ammunition, in the first minute."

1 • “The defendants were not fully trained, nor fully ready, for armed
2 conflict.”

3 • “It is obvious that the defendants, though they may have driven in the
4 same automobile, did not form a scheme or cabal to prepare for battle”

5 • “There are certainly many photographs taken by the agents Which
6 remain unseen.”

7 Mr. Aphrin claims to know the mental states of everyone involved, including
8 the defendants and their co-conspirators and apparently can discern what the
9 defendants and law enforcement personally observed on April 12, 2014. At best this
10 is sheer speculation and conjecture and is not the proper basis for expert testimony
11 under Rule 702. The physical evidence that Mr. Aphrin examined was seized close
12 to two years after April 12, 2014. Mr. Aphrin has no idea what was or was not
13 present on April 12, 2014. Even assuming evidence would need to be depicted to be
14 admissible, Mr. Aphrin admits that he did not review all of the evidence.
15

16 Finally, the motion raises several items the government does not intend to
17 introduce. The defendants seek to exclude mention of Jerad and Amanda Miller’s
18 presence at the Bundy Ranch in April 2014 and subsequent murder of two Las
19 Vegas Metropolitan Police officers. As an initial matter, the government has
20 previously advised, most recently at the December 9, 2016 hearing, and maintains
21 that it does not intend to reference the Millers’ affiliation with the Bundys and their
22 followers at trial unless somehow the defendants open the door to such subjects and
23 even then the government would take the matter before the court before any
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1 mention of the Millers. Similarly, the government, in its case in chief, does not
2 intend to introduce images of Scott Drexler holding a weapon or affiliating with
3 militia groups other than on or about April 12, 2014 in its case in chief barring the
4 defendants opening the door to such subjects. Accordingly, the Court should deny
5 the motion with respect to these subjects as moot. *See Allstate Ins. Co. v. Nassiri*,
6 No. 2:08-CV-369 JCM (GWF), 2013 WL 2393854, at *7 (D. Nev. May 29, 2013)
7 (denying defendant's motion in limine as moot based on plaintiff's representation
8 that he did not intend to introduce such evidence or argument); *United States v.*
9 *Navarro*, No. C 07-5126 SBA (PR), 2012 WL 3580284, at *10 (N.D. Cal. Aug. 17,
10 2012) (same).

11 The defendants fail to establish that any of the terms or evidence they seek
12 to exclude is irrelevant, more prejudicial than probative or implicates FRE 404(b).
13 Alternatively, the issues they raise are moot as the government does not intend to
14 introduce such evidence absent the defendants opening the door to these subjects.

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CONCLUSION

WHEREFORE, for all the foregoing reasons, the government respectfully requests that the Court enter an Order, denying defendant's Omnibus Motion in Limine and any related joinders.

DATED this 1st day of February, 2017.

Respectfully submitted,

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//s//

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CERTIFICATE OF SERVICE

I certify that I am an employee of the United States Attorney's Office. A copy of the foregoing **GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANTS OMNIBUS MOTION IN LIMINE (ECF No. 1332, 1340 and 1414)** was served upon counsel of record, via Electronic Case Filing (ECF).

DATED this 1st day of February, 2017

/s/ Steven W. Myhre

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